

AERIAL DEPOSITION OF HAZARDOUS SUBSTANCES – A LOOK AT PAKOOTAS V. TECK COMINCO METALS, LTD.

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On July 27, 2016, the Ninth Circuit Court of Appeals reached a decision in *Pakootas v. Teck Cominco Metals*, holding that the defendant – a Canadian smelter operator – is not liable under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for aerial emissions of various hazardous substances that were subsequently deposited onto and into the Upper Columbia River Site in Washington state.

The court reasoned that the defendant could not be liable under CERCLA as an *arranger* for the indirect aerial disposal of hazardous substances, finding that the “gradual spread of contaminants without human intervention” does not fit the definition of *disposal* in the CERCLA *arranger* context.

Background of the Case

The plaintiffs first brought suit against the defendant in 2004 for discharging hazardous substances into the Upper Columbia River Site over a century-long period. Ten years later, in 2014, plaintiffs amended their original claims, asserting that the defendant was liable under CERCLA as an *arranger*.

The plaintiffs argued that aerial emissions from the defendant’s smelting operations were subsequently deposited on the land and water at the Upper Columbia River Site. The district court denied the defendant’s motion to dismiss the case on the basis that the aerial emissions did not fit the definition of *disposal* under CERCLA. The court concluded that Congress had intended CERCLA to apply to remediating contamination resulting from aerial emissions.

Soon after, the defendant filed a motion for reconsideration after the Ninth Circuit Court’s decision in another air emissions case, *Center for Community Action & Environmental Justice v. BNSF Railway Co.*, where the court ruled that diesel aerial emissions that were subsequently deposited onto land did not meet the criteria for *disposal* under the Resource Conservation and Recovery Act (RCRA), and thus could not form the basis for liability under the RCRA. As the CERCLA definition of *disposal* incorporates the definition of *disposal* under the RCRA, the defendant sought reconsideration on the theory that their smelter operation’s aerial emissions and subsequent deposits on land and water would similarly not meet the criteria for *disposal* under CERCLA.

Though the district court denied the defendant’s motion for reconsideration, the Ninth Circuit granted interlocutory appeal and thereafter reversed the district court’s decision.

In their opinion, the Ninth Circuit court highlighted the factual similarities of *Center for Community Action & Environmental Justice v. BNSF Railway Co.* to *Pakootas*, noting that RCRA and CERCLA liability for *disposal* in an aerial emissions case arises only when the deposition of hazardous substances on land or water occurs prior to the aerial emission. Aerial emission leading to a gradual deposition of hazardous substances onto land or water – without any human intervention – cannot establish CERCLA *arranger* liability.

Effect on Air Emissions Generators

The effect of the *Pakootas* decision on future air emissions cases is likely to be significant. Under *Pakootas*, producers of hazardous air emissions cannot be held liable under CERCLA for subsequent deposits of said hazardous substances on land or water, unless the deposition is sudden, or unless the producer of emissions intervenes significantly.

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